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Citation for published version:

Campbell, L 2010, 'DNA Databases and Innocent Persons: Lessons from Scotland?', *Juridical Review*, pp. 285-96.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Juridical Review

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DNA DATABASES AND INNOCENT PERSONS: LESSONS FROM SCOTLAND?

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(forthcoming (2010) 4 *Juridical Review*)

Introduction

Databases of DNA samples are increasingly seen as a key element in the investigation of criminality, by providing a mechanism for detecting and resolving crimes effectively and expeditiously and by circumventing the need for new genetic tests of specific suspects in the context of each criminal inquiry. These factors, in addition to exonerative and deterrent effects, lend weight to the pragmatic argument that samples collected from all individuals who come to the attention of the police should be included in DNA databases, so as to enhance the likelihood of a successful match between a crime-scene sample and stored DNA. Holding an innocent person's DNA in such a repository for future speculative searches engages and affects various civil liberties, but the relevant Scottish legislation has been cited approvingly by the European Court of Human Rights (ECtHR) in *S and Marper v United Kingdom* as proportionate and compliant with human rights norms.¹ The current UK administration intends to bring the law in England, Wales and Northern Ireland in line with the legal framework in Scotland, in order to address criticisms of the English law in the same decision. This article analyses Scottish law on non-conviction DNA retention to determine if it represents the model of best practice, as was expressed by the ECtHR. I question whether Scotland should in fact be heralded as a lodestar in this context by unpacking three elements of the judgment in *S and Marper*, namely the right to privacy, the presumption of innocence, and the interest in not being stigmatised.² Furthermore, I point to recent developments introduced in Scotland by the Criminal Justice and Licensing Act 2010 which are potentially problematic in a human rights sense.

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¹ *S and Marper v UK* (2009) 48 E.H.R.R. 50 (hereafter *S and Marper*).

² I have explored the conceptual issues that arise in relation to DNA retention in more detail in L. Campbell, 'A rights-based analysis of DNA retention: "non-conviction" databases and the liberal state' (2010) 12 Criminal Law Review 889-906.

Non-conviction DNA retention in the United Kingdom

The divergence between the law in Scotland and the rest of the United Kingdom in respect of non-conviction databases³ was thrown into sharp relief by the decision of the Grand Chamber of the ECtHR in *S and Marper v United Kingdom*, which favoured the former approach. In England and Wales, the Police and Criminal Evidence Act 1984 (as amended) governs the collection and retention of DNA: a non-intimate sample⁴ (from which a DNA sample or profile may be generated) may be taken without consent from a person who has been charged with, informed that he will be reported for, or convicted of a recordable offence,⁵ and indefinite retention of samples is permitted.⁶ An application may be made to the relevant police force for removal of DNA from the database but this was rarely granted.⁷ The provisions in Northern Ireland governing DNA retention are identical to those in England and Wales.⁸ In Scotland, the legal measures relating to sample collection are comparable to the rest of the UK: a sample from which DNA may be gleaned may be collected from a person detained or arrested for an offence punishable by imprisonment.⁹ However, retention of the sample is permitted only after prosecution when it does not lead to conviction and only in relation to certain sexual or violent offences.¹⁰ In other words, retention is permitted only if proceedings have been instituted rather than after arrest or charge as occurs elsewhere in the United Kingdom, and this applies to a limited range of offences. The Criminal Justice and

³ The term “non-conviction” DNA retention is used throughout this piece as shorthand for storage of DNA which is not dependent on a criminal conviction and occurs regardless of the results of a criminal investigation or prosecution. The only viable alternative term, “pre-conviction”, may suggest that a conviction does indeed follow, which is not the case.

⁴ See ss.62 and 63 of the Police and Criminal Evidence Act 1984. Section 65 states that an “intimate sample” means a sample of blood, semen or any other tissue fluid, urine, saliva or pubic hair, or a swab taken from a person’s body orifice, while a “non-intimate sample” means a sample of hair other than pubic hair, a sample taken from or from under a nail, a swab taken from any part of a person’s body other than a body orifice, or a footprint or a similar impression of any part of a person’s body other than a part of his hand. Section 58 of the Criminal Justice and Public Order Act 1994 reclassified a swab from the mouth as a non-intimate sample which therefore does not require consent and does not need to be taken by a health care professional.

⁵ Criminal Justice and Public Order Act 1994 s 55, as amended by the Criminal Justice Act 2003 s 10. A recordable offence is one which carries the possibility of a custodial sentence as well as other, non-imprisonable offences in the Schedule to the National Police Records (Recordable Offences) (Amendment) Regulations 2005 (SI 2005/3106).

⁶ PACE, s.64(1)A, as inserted by the Criminal Justice and Police Act 2001.

⁷ *S and Marper* [35].

⁸ Police and Criminal Evidence Order of Northern Ireland 1989, as amended by the Criminal Justice and Police Act 2001.

⁹ Criminal Procedure (Scotland) Act 1995, s.18.

¹⁰ Criminal Procedure (Scotland) Act 1995, s.18A, as inserted by the Police, Public Order and Criminal Justice (Scotland) Act 2006. The list of these is contained in s.19A6.

Licensing (Scotland) Act 2010 adds the possession of offensive weapons to the list of relevant violent offences.¹¹ In Scotland indefinite retention of DNA before conviction is not allowed *per se*; according to s.18A(4) of the Criminal Procedure (Scotland) Act 1995 the destruction date is three years following the conclusion of proceedings and a sheriff may extend this for no more than two years.¹² However, nothing prevents recurring police applications to amend further this date. In addition to the differing schemes governing DNA collection and retention, Scotland has its own separate DNA database, although the included samples are duplicated on the UK-wide National DNA Database, and thus may be checked against those collected from persons in England, Wales and Northern Ireland.¹³

Concern about the disproportionality of the English law in terms of its breadth and duration was articulated by the Nuffield Council on Bioethics,¹⁴ and such disquiet was translated into robust legal criticism in *S and Marper* which found the “blanket and indiscriminate” retention of DNA to breach Article 8 of the ECHR.¹⁵ Notably, the Grand Chamber emphasised specifically the Scottish model as preferable.¹⁶ Article 53 of the ECHR requires a state party to an ECtHR case whose law is found to be incompatible with the Convention to amend its national law to cohere with the decision; nevertheless, the previous UK government demonstrated some reluctance to effect any substantial changes to English law.¹⁷ The Crime and Security Act 2010 was finally enacted to provide renewable retention periods of between three and six years, depending on the age of the suspect and the gravity of the offence, but this Act was not to come into force until the Secretary of State appointed by order. The change in the UK administration in May 2010 means this Act has been abandoned, and the Conservative/Liberal Democrat coalition now intends to move to the Scottish approach by means of the Freedom (Great Repeal) Bill.¹⁸

¹¹ This is in line with the recommendations in the Fraser Report on *Acquisition and Retention of DNA and Fingerprint Data in Scotland* and the subsequent Scottish Government Consultation Report. J. Fraser, *Acquisition and Retention of DNA and Fingerprint Data in Scotland*, (Scottish Government Report, 2008), available at http://www.sipr.ac.uk/downloads/Fraser_DNA_Report.pdf; Scottish Government, *Acquisition and Retention of DNA and Fingerprint Data in Scotland. Consultation Report* (2009) [18]. See L. Campbell, “The Scottish DNA Database and the Criminal Justice and Licensing (Scotland) Bill” (2010) *Edinburgh Law Review* 290.

¹² s.18A(5).

¹³ See P. Johnson and R. Williams, “DNA and Criminal Investigation: Scotland and the ‘UK National DNA Database’” (2004) *Scottish Journal of Criminal Justice Studies* 10.

¹⁴ Nuffield Council on Bioethics, *The Forensic Use of Bioinformation: Ethical Issues* (2007) [4.17] and [4.23].

¹⁵ *S and Marper* [119].

¹⁶ *S and Marper* [109].

¹⁷ See Home Office, *Keeping the right people on the database: Science and public protection* (2009).

¹⁸ See <http://libdems.org.uk/siteFiles/resources/PDF/Government/Nick-Clegg-New-Politics.pdf>.

Unpacking the Scottish scheme

The proposed legal shift towards standardising the laws on non-conviction DNA retention across the United Kingdom underlines the significance of a rights-based analysis of the Scottish laws specifically. Essentially, if the Scottish scheme is to act as a prototype, then a deeper consideration of its effect on human rights and its compliance with existing ECHR jurisprudence is vital. Here I assess the legal and normative status of the Scottish law as a model of best practice as regards non-conviction DNA retention, and, drawing on the approach of the Grand Chamber in *S and Marper*, focus on the right to privacy, the presumption of innocence, and the interest in not being stigmatised by the State.

The right to privacy

The right to privacy is that most often cited in relation to DNA retention,¹⁹ and indeed the right to private and family life under Article 8 of the ECHR formed the central aspect of the decision in *S and Marper*. Personal privacy is affected by DNA retention due to the nature of genetic material which determines physical characteristics, susceptibility to disease and ethnic origin. An individual's DNA is unique (except in the case of identical twins) and is inherited from both one's parents. Thus DNA has the potential to reveal familial relationships, given that more similarities may be seen in the DNA of siblings and family members when compared with unrelated persons. DNA retention also affects the right to informational privacy, that is, the right to retain control or at least oversight of data or material taken from or relating to oneself.

In *S and Marper* the English Court of Appeal had upheld the unsuccessful judicial review of the decision to collect and retain DNA from S (an acquitted child) and Marper (an adult against whom proceedings were not initiated) on the grounds that the risks to the individual were not great and were outweighed by the benefits of retention; the House of Lords also dismissed their appeal. The House found that there was no breach of Article 8, but that if such a breach existed it constituted only minor interference with the right to privacy and that retention was proportionate to its aims, on the basis of the benefits in the fight against crime, that material could be used for limited purposes and was not made publicly available, and that the particular person was not identifiable from the DNA profile to the untrained eye.

¹⁹ A. Roberts and N. Taylor, "Privacy and the DNA database" (2005) *European Human Rights Law Review* 381.

In contrast, the Grand Chamber concluded that the systematic retention of DNA samples interferes with the right to respect for private life, following *Van der Velden v The Netherlands*,²⁰ and concurred with the dissent of Baroness Hale in the House of Lords regarding the nature and amount of information in such samples. While the collection and retention of DNA from all individuals charged with a recordable offence in England and Wales was in accordance with the law and had a legitimate aim, it was not found to be necessary in a democratic society. The “blanket and indiscriminate” power of retention, regardless of the nature and gravity of the offence, the absence of a time limit, the stigmatisation of innocent people, and the restricted possibilities for removal of data were seen as contributing to the violation of Article 8. Although the value of DNA in criminal investigations was acknowledged, the Grand Chamber favoured the threshold adopted in other states regarding the minimum level of severity of the crime before DNA would be retained, in particular the Scottish legislation.²¹ It further emphasised the need for “strictly defined storage periods for data”, such as occurs in Scotland.

This decision represents a judicial imprimatur for the Scottish legislation, based on the breadth of relevant offences and the determinate duration of retention. However, if we consider DNA databases to constitute a form of surveillance, as was the view of the House of Lords Constitution Committee,²² this may indicate a line of relevant jurisprudence which undermines the apparent legitimacy of the Scottish scheme and its role as an exemplar for the other jurisdictions in the UK. DNA databases seem to represent an interim category between mass surveillance such as CCTV, which is not discerning with regard to whom it monitors, and targeted surveillance, which concerns specific individuals, by virtue of the focus of DNA databases on classes of individuals who share the characteristic of being suspected of a serious crime. Previously, the European Court has found that where there is state surveillance of individuals, supervisory control ideally should come from judicial officers,²³ but other agencies or bodies have been approved if “independent of the authorities carrying out the surveillance, and ... vested with sufficient powers and competence to exercise an effective and continuous control”.²⁴ For example, in *Leander v Sweden* the Court found that a police register of

²⁰ *Van der Velden v The Netherlands*, no 29514/05, December 7, 2006.

²¹ *S and Marper* [109]-[110].

²² House of Lords Constitution Committee, *Surveillance: Citizens and the State* Volume I (HL Paper 18-I) (2009) [24].

²³ *Kruslin v France* (1990) 12 E.H.R.R. 547.

²⁴ *Klass v Germany* (1979) 2 E.H.R.R. 214 [56].

confidential personal information which was used in assessing candidates for positions critical to national security was legitimate, despite the lack of court intervention, because of the supervision from independent parliamentary sources and also when it balanced the interest of the state in protecting its national security against the seriousness of the interference with private life.²⁵ In contrast, although there was judicial oversight of phone tapping in *Kruslin v France* the quality of the law was not sufficient for the surveillance to be in accordance with law.²⁶ Non-conviction DNA retention in Scotland initially is contingent on police judgment only, but shrieval approval is required for extension of the time frame for unconvicted persons, and the Chamber in *S and Marper* noted that this complies with the Committee of Ministers' Recommendation R(92)1.²⁷ However, drawing on *Leander*, if we view databases as a form of surveillance, then judicial involvement seems to be required under the ECHR at an earlier stage of the DNA retention process than currently occurs in Scotland unless adequate supervision is provided by another body. DNA may be retained in Scotland for three years before shrieval approval is sought, and the absence of court intervention needs to be offset by a rigorous governance structure to comply with the dictum in *Leander* regarding state surveillance and storage of personal information.

As noted above, Scotland possesses its own DNA database, as well as exporting samples to the National DNA Database (NDNAD), although this arrangement is not reciprocal. Governance of both databases in the United Kingdom seems not to comply with existing ECHR jurisprudence on supervision of surveillance. The National DNA Database Strategy Board, which provides oversight of the NDNAD, comprises representatives from the Human Genetics Commission and the Information Commissioners' Office, as well as members from the Home Office, the National Policing Improvement Agency, and the Association of Police Authorities,²⁸ thereby calling into question its independence. Moreover, despite the lauding of the Scottish scheme by the Grand Chamber, there is no equivalent Strategy Board in Scotland. This absence of oversight was focused upon in the Scottish Government Consultation Report where a number of parties, including the Association of Chief Police Officers in Scotland, favoured an independent governance structure and suggested the appointment of an independent Forensic

²⁵ *Leander v Sweden* (1987) 9 E.H.R.R. 433 [49] and [59].

²⁶ *Kruslin* [34]-[35].

²⁷ *S and Marper* [110].

²⁸ Parliament Office of Science and Technology, *Postnote: The National DNA Database*, Number 258 (2006) available at www.parliament.uk/documents/post/postpn258.pdf.

Science Regulator for Scotland.²⁹ Judicial approval should be sought for DNA retention of unconvicted suspects *ab initio* so as to ensure more rigorous and independent supervision of the infringement on personal privacy. Although ostensibly of less direct impact, retaining personal biological material is equivalent conceptually to a police register or the state monitoring one's phone calls or the like. Considerable care regarding the retention and storage of DNA is warranted due to the depth and sensitivity of the data contained within, including details about familial relationships and ethnic origin, and given that the rapidly developing technology extends the information which may be gleaned. This suggests that judicial or other independent supervision is warranted, but such a provision was not included in the Criminal Justice and Licensing (Scotland) Act 2010. Thus, although the Scottish DNA retention model was praised in *S and Marper*, the current governance arrangements undermine its putative position as a model of best practice in the context of Article 8.

The presumption of innocence

In addition to the focus on personal and informational privacy in *S and Marper*, the applicants claimed that DNA retention casts suspicion on unconvicted persons, implying that they are not “wholly innocent”.³⁰ Certainly, non-conviction storage of DNA seems to demonstrate the state's aversion to risk and the maintenance of suspicion about certain suspects; this distinguishes them from “truly” innocent people who have never been arrested or prosecuted. On the face of it, this may compromise the precept that everyone should be presumed innocent, by storing the DNA of innocent and convicted individuals in an equivalent manner. Indeed, the ECtHR expressed concern that unconvicted persons, who “are entitled to the presumption of innocence, are treated in the same way as convicted persons”.³¹ However, this factor merely underpinned its ultimate judgment on Article 8, demonstrating that the analysis of the “presumption of innocence”, as explicitly referred to by the Grand Chamber, was embodied within concerns about privacy.

The presumption of innocence is safeguarded by Art.6(2) of the ECHR which provides that “[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. Although this article was not explored in *S and Marper*, the maintenance of formalised suspicion in the form of DNA retention may breach Article 6.2, given that the

²⁹ Scottish Government Consultation Report, above, n.11, [37].

³⁰ *S and Marper* [89].

³¹ *Ibid* [122].

presumption of innocence in ECHR jurisprudence encompasses a “reputational” aspect which aims to protect the image of the person.³² Art.6(2) is breached where judicial decisions or reasoning reflect an opinion that a person is guilty,³³ and where a court expresses suspicion about an acquitted individual (rather than opining that he is guilty), such as by refusing compensation to him or by saying that suspicion has not been “dispelled”.³⁴ However, where criminal proceedings are discontinued, statements which describe a state of suspicion, as opposed to those which constitute a determination of guilt, are compatible with the presumption of innocence.³⁵ Furthermore, Art.6(2) may be breached by State actors other than the courts,³⁶ such as in the declaration of an applicant’s guilt which prejudged judicial assessment of the case.³⁷

Non-conviction DNA retention is not an expression of guilt but may denote suspicion on the part of the state as to the future criminality of the person and his likelihood of re-offending. In Scotland, this concern is relevant, notwithstanding the circumscribed population of suspects prosecuted for serious or sexual offences to whom DNA retention applies. In *S and Marper* the Grand Chamber stated that “the retention of the applicants’ private data cannot be equated with the voicing of suspicions”.³⁸ While this distinction is not explained or explored by the Chamber, one can speculate that the absence of express articulation and dissemination of the fact of DNA retention differentiates it from the voicing of suspicion. Nevertheless, DNA retention arguably is on a continuum from the latter as it represents state opinion about criminal tendencies on the part of the charged or acquitted person. If such an analogy is accepted and, despite the comment of the Grand Chamber, we conceive of State storage of DNA as representing a type of expression of suspicion, then the presumption of innocence in its reputational sense may be threatened by the Scottish scheme of DNA retention.

Even if we cannot accept this analogy, and thus find that the reputational aspect of the presumption of innocence is not breached by the Scottish legislation, drawing a comparison with the deprivation of liberty pre-trial after the refusal of bail may challenge the legitimacy of the existing scheme of non-conviction DNA retention. While Article 5 of the ECHR protects the person’s right to liberty, it permits this to be limited “when it is reasonably considered necessary

³² S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford UP, 2005), p.164.

³³ *Minelli v Switzerland* (1983) Series A no. 62 5 E.H.R.R. 554 [37]-[38].

³⁴ *Sekanina v Austria* (1994) 17 E.H.R.R. 221 [29]. Also see *Asan Rushiti v Austria*, no. 28389/95, March 21, 2000.

³⁵ *Sekanina v Austria* [30]; *Englert and Nölckenbockhoff v Germany*, August 25, 1987, Series A no. 123 [37]-[39].

³⁶ *Allenet de Ribemont v France* (1995) 20 E.H.R.R. 557 [36].

³⁷ *Ibid* [41].

³⁸ *S and Marper* [122].

to prevent his committing an offence or fleeing after having done so”. Therefore, it would appear that if refusal of bail is permissible, surely the less invasive retention of DNA must also be. Indeed, in contrast to pre-trial detention, and as the UK Government emphasised in *S and Marper*, there appears to be no practical consequence of DNA retention for the particular individual unless his sample later matches a crime-scene profile.³⁹ Admittedly, the impact of DNA retention on an individual’s rights is more remote and undoubtedly of less immediate consequence than the refusal of bail; nevertheless, the incursion on freedom of personhood that it entails is no less real than the effect on freedom of the person of the latter. As noted above, storing DNA means state retention of unique personal data which can also reveal information about familial relationships and ethnic origin.⁴⁰ Moreover, in the context of bail, pre-trial detention pertains to a particular charge alone and a subsequent acquittal or dropping of charges brings custody to an end. In contrast, and, crucially, DNA remains in the state’s possession despite the result of prosecution.

Given that DNA retention seems comparable to bail refusal, the restrictions imposed in relation to the latter may be useful in determining what should be permitted in the context of DNA retention, given that in both instances the rights of an individual who is legally innocent are qualified by virtue of a possible risk of criminality. “Strong and specific reasons” are required to restrict the defendant’s liberty⁴¹ on the basis of his presumed innocence and the rule of respect for individual liberty as safeguarded by Article 5:⁴² in other words, each case is examined on its merits. Moreover, a bail refusal follows a court decision. This suggests that, before the retention of a DNA sample, judicial intervention is necessary at an earlier stage than is currently required in Scotland.

The interest in not being stigmatised

Although the Grand Chamber felt that the Scottish model of non-conviction DNA retention was proportionate to its aims and purposes in relation to the right to privacy, the absence of governance or oversight challenges this. Moreover, judicial intervention at an earlier stage would

³⁹ *Ibid* [94].

⁴⁰ *Ibid* [73]-[76].

⁴¹ A. Ashworth, “Four threats to the presumption of innocence” (2006) 10 *International Journal of Evidence & Proof* 241 at 244.

⁴² *W v Switzerland* (1993) 17 E.H.R.R. 60; *Labita v Italy*, No.26772/95, 6 April 2000; *Smirnova v Russia* (2004) 39 E.H.R.R. 22.

mitigate concerns raised in relation to the presumption of innocence. A final aspect of the *S and Marper* decision which is not resolved by the Scottish approach pertains to a more conceptual concern about the interest in not being stigmatised unnecessarily and the parameters of state power.⁴³ Ongoing storage of DNA, while predicated initially on a reasonable police belief of involvement in crime and the procurator fiscal's decision to prosecute because of the adequacy of evidence, is not in line with the spirit of the broader interpretation of the presumption of innocence considered in *S and Marper*.⁴⁴ Rather than conflating this concept with the narrow legal presumption illustrated above, I propose to characterise it as an interest in not being "stigmatised" by the state.⁴⁵ Scottish DNA retention policies, while more circumscribed than other UK measures, suggest a move from the traditional dyad of guilt and innocence to the generation of a continuum of guilt, where what are perceived to be minor incursions on an individual's rights are permitted depending on the extent of suspicion that exists.

Echoing the UK Government in *S and Marper*, it may be argued that retention bears no stigma, given that there is no public expression of suspicion.⁴⁶ Nevertheless, the Grand Chamber stressed the applicants' "perception that they are not being treated as innocent";⁴⁷ in other words, DNA retention officially, if not publicly, labels people as potentially criminal, and this label is known to the individuals themselves and any state agents with access to the relevant samples and files. Therefore, in a normative sense the retention of DNA affects how the state views certain categories of people, namely those who are prosecuted but not convicted in Scotland for certain serious offences. The failure of the Grand Chamber to acknowledge the stigmatising effect of the more limited Scottish DNA retention policy undermines the legitimacy of the Scottish approach, whether we view this interest as part of the right to privacy, the presumption of innocence, or a discrete concept in its own right.

In addition to this issue, a problematic development as regards the potential stigmatisation of young people in particular is evident in the Criminal Justice and Licensing (Scotland) Act 2010,⁴⁸ which does not cohere with *S and Marper*. The Act now permits DNA to be retained from children who have been referred to the Children's Hearing System (CHS)

⁴³ See Campbell, above, n.2, for a more thorough interrogation of this argument.

⁴⁴ *S and Marper* [122].

⁴⁵ Despite some concern about the appropriateness of this term I have adopted it, following the Grand Chamber (*S and Marper* [122]).

⁴⁶ *Ibid* [94].

⁴⁷ *Ibid* [122].

⁴⁸ See Campbell, above, n.11.

for suspected criminal behaviour. Most children who come to the attention of the police in Scotland are dealt with by the informal⁴⁹ CHS rather than being prosecuted in the criminal courts. This approach, established by the Social Work (Scotland) Act 1968, is predicated on the view that children and young people who are involved in offending behaviour or are victims of abuse or neglect should be treated in the same system according to their needs, and intervention must be in the best interests of the child. Where the child is abusing drugs, missing school, or committing an offence, and if compulsory measures of supervision may be necessary, the child may be referred to a children's hearing.⁵⁰ Following the recommendation of the Fraser Report,⁵¹ the Criminal Justice and Licensing (Scotland) Act 2010 permits retention of DNA samples from children referred to the CHS for sexual or violent offences for a three year period with possibility of extensions for two year blocks.⁵² The child, along with his parent/guardian, must accept the ground of referral to the Hearing, or a sheriff must find the ground of referral to the CHS to be established. While retention of a minor's DNA after conviction is not in breach of the ECHR,⁵³ in *S and Marper* the Grand Chamber noted "the risk of stigmatization" in treating persons who have not been convicted in the same way as convicted persons.⁵⁴ Children involved in the CHS are not convicted and do not enjoy complete Article 6 rights throughout, and the CHS does not determine a criminal charge.⁵⁵ Although the statutory time period in the 2010 Act for children in the CHS echoes that for adult suspects rather than convicted persons as such, three years plus an additional two years is unduly lengthy in relation to young people. Indeed in *S and Marper* it was noted that that the retention of unconvicted persons' data may be especially harmful in the case of minors "given their special situation and the importance of their development and integration in society".⁵⁶ The psychological developmental immaturity of children and adolescents may result in ill-considered actions and render them more vulnerable to negative influences,⁵⁷

⁴⁹ C. McDiarmid, "Perspectives on the Children's Hearings System" in J. Scoular (ed), *Family Dynamics: Contemporary Issues in Family Law* (Butterworths, 2001), pp. 29-48.

⁵⁰ Children (Scotland) Act 1995, s.52.

⁵¹ Fraser, above n.11, p.19.

⁵² Criminal Justice and Licensing (Scotland) Act 2010, s.80, inserting ss.18E and F into the 1995 Act.

⁵³ *W v The Netherlands*, no 20689/08, January 20, 2009.

⁵⁴ *S and Marper* [122].

⁵⁵ *S v Miller* 2001 SC 977.

⁵⁶ *S and Marper* [124].

⁵⁷ L. Steinberg and E. Scott, "Less Guilty by Reason of Adolescence Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty" (2003) 58:12 *American Psychologist* 1009 at 1010.

underlining that different standards need to be imposed in relation to measures which impact on their personal and informational privacy and their interest in not being stigmatised. The inclusion of children's DNA in the database, even for a limited period, seems a dishonest means of subsuming them into formal crime control mechanisms, and may lead to their perception of being labelled as criminal, which conflicts with the welfare principle articulated in s.16 of Children (Scotland) Act 1995. To put it bluntly, it demonstrates the state's perception of them as part of a criminogenic population rather than children at risk or in need, which lies at the core of the ethos of the CHS. Although the paramountcy accorded to welfare in the CHS may be overridden to protect the public from serious harm,⁵⁸ the retention of DNA seems too remote in this respect. Furthermore, given that more serious offences alleged to be committed by children are dealt with through the criminal courts,⁵⁹ it is curious that the Act brings within its scope children who are being dealt with in a measured and holistic way in the CHS. In essence, these new measures relating to children appear disproportionate when the dicta in *S and Marper* regarding stigmatisation are considered, and further call into question the legitimacy of the Scottish scheme of non-conviction DNA retention.

Conclusion

By unravelling three elements of the judgment in *S and Marper*, and by extending the analysis to consider congruent jurisprudence which was not explored by the Grand Chamber, I have sought to shed light on the problematic elements of the Scottish system of DNA retention of non-convicted persons. Despite the praise in Strasbourg, the measures may not be proportionate in the context of privacy given the absence of automatic judicial intervention from the time that a prosecution fails to lead to conviction and the structure of governance in place. In addition, a more expansive interpretation of what the storage of genetic material entails suggests that the presumption of innocence is also compromised by the lack of judicial approval from initial retention. Furthermore, the prolonging of the suspect status despite acquittal in court, with the inherent stigma (whether it be publicised or not) and state intervention, challenges the Scottish approach. Such concern is further exacerbated by the developments concerning children in the

⁵⁸ Children (Scotland) Act 1995, s.16(5).

⁵⁹ Lord Advocate's Guidelines to Chief Constables Reporting to Procurators Fiscal of Offences Alleged to have been Committed by Children, January 2010, available at <http://www.copfs.gov.uk/Resource/Doc/7/0000608.pdf>.

2010 Act. Essentially, this analysis queries the legality of retention of DNA from non-convicted persons in Scotland, and its purported role as a paradigm for other states.